89-320

No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NATIONAL DEMOCRATIC POLICY COMMITTEE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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August 24, 1989

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether a district court may enter judgment imposing a multimillion dollar civil contempt fine against a political action committee (a) in the absence of a hearing of any kind, (b) in the absence of clear and convincing evidence of contempt, and (c) without consideration of the good faith nature of the organization's subpoena compliance or the absence of its financial resources to pay the fine?

2. Whether, more than a year after expiration of the grand jury that subpoenaed an organization's records, a district court may enter a "coercive" civil contempt judgment against the organization upon a motion that was filed by the government after the grand jury had expired?

PARTIES

The appellants below were the petitioner herein, National Democratic Policy Committee, and three other organizations, Caucus Distributors, Inc., Fusion Energy Foundation, and Campaigner Publications, Inc. The appellee below was the United States of America.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The National Democratic Policy Committee ("NDPC") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered on March 29, 1989 in this case.

OPINIONS BELOW

The district court's opinion is not reported; it is reprinted in the appendix to this petition at 16a. The opinion of the United States Court of Appeals for the First Circuit is reported at 871 F.2d 156 and is reprinted in the appendix to this petition at 1a.

JURISDICTION

The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1). The judgment of the United States Court of Appeals for the First Circuit

was entered on March 29, 1989. Petitioner filed a timely request for rehearing. The First Circuit denied rehearing on May 30, 1989. This petition is filed within ninety days thereafter.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves first amendment protections of political association and fifth amendment due process protections. The First Amendment and the Fifth Amendment to the United States Constitution are set forth in the appendix at 45a.

STATEMENT OF THE CASE

NDPC is a controversial political action committee identified with the political views of Lyndon LaRouche. It received a grand jury subpoena calling for the production of several categories of generically described records, including fundraising records. Three other LaRouche-related organizations received identical subpoenas. At first, no organization produced records, asserting legal objections to the subpoenas.

The district court ordered NDPC and the other three organizations to comply with the subpoenas, finding that they were in civil contempt. The district court did not specify any particular documents to be produced, ordering only that there be subpoena compliance. The district court ordered that a daily fine of $10,000 would be imposed during any period of noncompliance.

NDPC undertook compliance, producing tens of thousands of documents to the grand jury. The government never sought any specific document from NDPC or claimed that NDPC was failing to produce any specific document or category of document. By contrast, the government vigorously maintained that another organization, Caucus Distributors, Inc., had failed to produce index cards with fundraising information on them; as a consequence, the district court specifically ordered Caucus to

produce the index cards and increased Caucus' fine to coerce their production. *See In re Grand Jury Proceedings*, 795 F.2d 226 (1st Cir. 1986) (appeal by Caucus from index card fine), *cert. denied*, 479 U.S. 1064 (1987).

More than a year after NDPC's production of records to the grand jury, and long after the grand jury had expired, the government obtained and executed certain search warrants relating to Caucus and other entities. The warrants did not refer to NDPC or its property. During the searches pursuant to those warrants, index cards showing telephone contacts with contributors were seized.

Having seized the cards, the government filed a motion to assess against NDPC a fine of $10,000 per day for the 511 days preceding seizure of the index cards. Ignoring the previous litigation concerning Caucus' obligation to produce these cards, the government relied solely upon the affidavit of FBI Agent Martha Wilkes (App. at 25a), who acknowledged that her affidavit rested largely on hearsay. Agent Wilkes described the previous Caucus litigation and then, without explanation, alleged in her affidavit that the index cards were found in "contemnors' offices," possibly referring to all four of the LaRouche-related organizations that had received grand jury subpoenas almost two years earlier. At best, NDPC was drawn into the Wilkes affidavit by the use of an apostrophe at the end of the word "contemnors." Wilkes did not mention NDPC by name or offer any fact concerning NDPC.

NDPC offered a legal memorandum and two affidavits of its chairman to deny the allegation of contempt.

> [T]he only evidence tendered to support the government's draconian request is an affidavit which alleges a failure to produce records that, per order of this Court, belong to another party.

App. at 38a (NDPC Opposition Memorandum).

> These allegations are untrue and completely misrepresent NDPC's record of compliance.
>
> To the best of my knowledge, the NDPC *fully* complied with the grand jury subpoena and produced all documents responsive thereto within its possession, on or before the end of June 1985.

App. at 28a & 31a (Affidavits of NDPC Chairman). NDPC's chairman further swore to his belief that NDPC had complied with the grand jury subpoena substantially and in good faith and referred the court to the government-created "grid of production" showing NDPC's production of numerous boxes of documents. NDPC made a specific request for a hearing (App. at 34a).

The district court denied NDPC's request for a hearing, entering a $5.11 million judgment solely upon the basis of Wilkes' hearsay affidavit (App. at 16a). The district court did not address whether the affidavit constituted "clear and convincing evidence" of contempt by NDPC. The district court treated as irrelevant NDPC's pleas that such a large fine would destroy it and was inconsistent with NDPC's substantial compliance in good faith with the grand jury's subpoena.

The First Circuit affirmed (App. at 1a), declining to address the first amendment implications of judicial use of the contempt power in a way that will destroy a political action committee or any purely political entity. The First Circuit held that NDPC was not entitled to a hearing, even though it had requested a hearing, had denied any contempt, had pleaded substantial compliance in good faith, and had questioned its financial ability to pay a fine. The First Circuit held that the FBI agent's affidavit, even considering its failure to mention NDPC by name, was a sufficient basis for the multimillion dollar judgment, refusing to apply the "clear and convincing

evidence" standard required in civil contempt cases. Finally, the First Circuit roughly halved the fine by holding that its daily accumulation could not extend past the expiration of the grand jury. The First Circuit held, however, that the district court did have the authority to enter a civil contempt fine more than a year after the expiration of the grand jury.

We note finally that NDPC was not investigated or charged with a crime because of nonproduction of the index cards. In the District of Massachusetts, in No. 86-323-K, Caucus was indicted for obstruction of justice, upon the allegation:

> These index cards . . . were maintained in the offices of defendant Caucus. . . . Contact cards were similarly prepared, maintained and used by defendant Caucus in other cities throughout the United States, including . . . Leesburg, Virginia.

REASONS FOR GRANTING THE WRIT

I. Due Process and First Amendment Principles Are Offended by Entry of a Multimillion Dollar Civil Contempt Fine Against a Political Organization (A) in the Absence of a Hearing Concerning the Existence of Contempt and Substantial Compliance in Good Faith, (B) Without Clear and Convincing Evidence, and (C) Without Consideration of the Organization's Financial Inability to Pay the Fine.

Coercive civil contempt fines are an exercise of the inherent power of the federal courts. Because such fines do not depend directly upon statute or rule, the exercise by federal courts of power in this regard is particularly within the province of this Court to supervise and control. Guidance has not been given concerning the use of the courts' inherent power when it is used to levy civil contempt fines that will economically destroy a political organization. This Court has, however, established clear precedent to insure due process in civil contempt cases

and to insure precision in the imposition of liability upon political organizations in all cases. As well, civil contempt principles from other circuits protect the due process interests of alleged contemnors. We believe that the First Circuit's opinion in this case is squarely at odds with the entire body of applicable precedent from this Court and from a number of courts of appeals.

A. *Precedent of this Court and Several Circuits Holds that an Alleged Contemnor is Entitled to a Hearing, Except Where Contempt is Admitted, and the First Circuit Holding Conflicts with this Precedent.*

The First Circuit concluded that all the relevant questions could be resolved upon the affidavits before it. That holding is in direct conflict with *McNeil v. Director*, 407 U.S. 245 (1972). Although *McNeil* was not a civil contempt case, the State of Maryland contended that an institutional commitment could be justified as an exercise of the civil contempt power. The Court rejected that argument because there had been no hearing, holding: "due process requires a hearing to determine whether [the alleged contemnor] has in fact behaved in a manner that amounts to contempt." *McNeil v. Director*, 407 U.S. 245, 251 (1972).

The First Circuit's holding also conflicts with the law in other circuits. The Second Circuit and the Ninth Circuit have clear requirements that there be a hearing before a civil contempt sanction is imposed. *Matter of Kitchen*, 706 F.2d 1266 (2d Cir. 1983); *United States v. Alter*, 482 F.2d 1016 (9th Cir. 1973). *Cf.* Fed. R. Crim. P. 42(b) (criminal contempt requires notice and hearing). Outside the First Circuit, the only ground for denying a hearing to an alleged civil contemnor is the contemnor's admission of the contempt or the failure to deny the contempt when put on direct notice to do so. *See Hoffman v. Beer Drivers & Salesmen's Local Union*, 536 F.2d 1268, 1277 (9th Cir. 1976). Neither of those exceptions is applicable here.

The First Circuit holding in this case also is contrary to decisions of the Sixth Circuit and District of Columbia Circuit. Explaining its holding that no hearing was required, the First Circuit interpreted NDPC's affidavits and legal memoranda to say only that NDPC had offered massive compliance with the grand jury subpoena and had produced tens of thousands of documents. But NDPC did assert that it had fully complied with the government's subpoena; in no other circuit could this assertion be disregarded without a hearing. Such claims of good faith and substantial compliance are precisely the matters that *must* be considered, according to the other circuits. *Rogers v. Webster*, 776 F.2d 607, 612 (6th Cir. 1985); *WMATA v. Amalgamated Transit Union*, 531 F.2d 617, 621-22 (D.C. Cir. 1976). *See United States v. United Mine Workers*, 330 U.S. 258, 304 (1947) (court must consider magnitude of harm); *General Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376 (9th Cir. 1986) (must consider contemnor's substantial compliance).

These principles are turned on their heads in the First Circuit opinion. If permitted to stand, the First Circuit opinion means that a straightforward denial of contempt, joined with a strong assertion of substantial compliance with a grand jury subpoena, is not enough to merit a hearing for an alleged contemnor. It means that knotty contempt issues affecting strong liberty and financial interests can be adjudicated based on paper affidavits. At a minimum, the First Circuit holding that NDPC was not entitled to a hearing throws the meaning of *McNeil* into substantial confusion and creates a conflict among the courts of appeals.

B. *The First Circuit's Opinion Conflicts with Supreme Court and Circuit Precedent Requiring that Contempt Be Proved by "Clear and Convincing Evidence," Particularly Where First Amendment Interests Are Implicated.*

In the district court, the government filed a pleading conceding that civil contempt must be proved by "*clear and convincing* evidence" (First Circuit App. at 34). The underscoring was done by the government in the original. Yet the First Circuit questioned an alleged contemnor's right to proof by clear and convincing evidence, contrary to precedent in other circuits and to first amendment principles articulated by the Supreme Court, and held further that NDPC waived any right to clear and convincing proof.

Clear and convincing proof of civil contempt is the traditional standard employed outside the First Circuit, and it is employed whether or not an alleged contemnor specifically mentions that it is the applicable standard of proof. *E.g.*, *Stotler & Co. v. Able*, 870 F.2d 1158, 1163 (7th Cir. 1989); *Balla v. Idaho State Board of Corrections*, 869 F.2d 461, 466 (9th Cir. 1989); *Washington-Baltimore Newspaper Guild v. Washington Post Co.*, 626 F.2d 1029 (D.C. Cir. 1980). The First Circuit's contrary holding was of crucial importance in this case because the Wilkes affidavit, the only basis for the multimillion dollar judgment, contained no evidence concerning NDPC and, therefore, did not contain even arguably clear and convincing evidence.

The First Circuit's dispensation with the need for clear and convincing proof, without citation to authority, is particularly troublesome because of *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). *Claiborne Hardware* involved civil damages against a political organization because of an economic boycott, and not civil contempt. It announced first amendment principles, however, intended to govern the imposition of liability upon polit-

ical organizations, and the opinion states no limitation concerning the type of liability involved. In particular, *Claiborne Hardware* requires that: (a) the liability of political organizations be established with precision, based on specific evidence of whose conduct and what conduct is the basis of that liability; and (b) money judgments against political organizations be carefully tuned to reflect the precise liability that was established.

Claiborne Hardware and the heretofore well-established line of clear-and-convincing circuit precedent were ignored by the First Circuit, although NDPC pressed these points vigorously. It is not possible to square the First Circuit's treatment of NDPC with that body of precedent from this Court and the courts of appeals. Moreover, the First Circuit's unexplained departure from rules requiring clear and convincing proof is particularly ill-suited where a court exercises its inherent power to coerce a political organization and, in doing so, essentially condemns it to economic death by the imposition of a fine drastically beyond the financial means of the organization.

C. *The First Circuit Rule that a Contemnor's Financial Resources Need Not Be Considered Conflicts with Supreme Court and Circuit Precedent.*

NDPC is regulated by the Federal Election Commission (First Cir. App. at 84, 126, 453-55). Records of the Federal Election Commission show that NDPC receives approximately $400,000 each year in contributions to pursue political and election activity. As to a multimillion dollar fine, NDPC urged the district court that such a fine would be a "death knell" and "draconian," that it did not have the "financial wherewithal" to pay it, and that it would "destroy" NDPC (First Cir. App. at 71-87, 94, 582). The district court held no hearing on this issue, and the First Circuit held that the district court *could not* consider NDPC's financial resources when entering the civil contempt judgment. The First Circuit reasoned that financial resources can be considered by a

district court only when the daily rate for a coercive fine is originally announced. In effect, the First Circuit ruled that a district court is without discretion to consider the actual size of any fine that is imposed thereafter.

The First Circuit's new rule is directly contrary to *United Mine Workers*, which the First Circuit failed to mention.

> [A] court which has returned a conviction for contempt must, in fixing the amount of a fine to be imposed as a punishment or as a means of securing future compliance, consider the amount of defendant's financial resources and the consequent seriousness of the burden to that particular defendant.

United States v. United Mine Workers, 330 U.S. 258, 304 (1947). The Supreme Court has never limited the *United Mine Workers* holding, and it is followed outside the First Circuit. *E.g.*, *Dole Fresh Fruit Co. v. United Banana Co.*, 821 F.2d 106, 110 & n.3 (2d Cir. 1987) (court must explicitly address financial resources, and contemnor does not have burden on this issue); *New York v. Shore Realty Corp.*, 763 F.2d 49, 54 (2d Cir. 1985) ("[C]areful fact-finding concerning . . . the defendants' financial resources is required.").

It is impossible to conceive of a case in which the financial resources of an alleged contemnor could be worthier of consideration. The contempt in issue involved the non-production of a few index cards that never had been specifically requested from petitioner. The production of these cards did not become an issue until almost a year after the grand jury expired, yet the district court imposed a fine that will be an economic death penalty for a nationally active political organization. In these circumstances, the First Circuit rule that financial resources cannot be considered when a civil contempt fine actually is assessed will effectively gut *United Mine Workers*.

II. The First Circuit's Decision Permits the Imposition of Civil Contempt Fines After the Expiration of the Grand Jury and Is In Conflict with this Court's Decision in *Shillitani* and the Ninth Circuit's Decision in *In re Grand Jury Proceedings*.

It is black letter that civil contempt sanctions must have a coercive, not punitive, effect. Here, the multi-million dollar civil contempt sanction was imposed more than one year after the grand jury had expired. If the First Circuit decision stands, there will be no time limit on contempt proceedings in connection with a grand jury whose work has ended.

In *Shillitani v. United States*, 384 U.S. 364 (1966), the Court held that a person may not be jailed beyond the term of the grand jury. Although *Shillitani* did not speak to fines, there is no basis to say that a contemnor may be fined but not jailed after the grand jury expires. It is no solution to say, as the First Circuit did, that the fine imposed is based on contempt that occurred during the term of the grand jury, for the issue is whether the sanction, when it is imposed—not when it is threatened—can be coercive. It cannot be true, for example, that *Shillitani* permits a contemnor to be threatened with coercive incarceration for noncompliance with a grand jury subpoena two months before the grand jury's term expires and, after the grand jury expires, to be jailed for two months if the court should decide then that the contemnor never complied with the subpoena.

The issue is one of jurisdiction as well as coercion. The Ninth Circuit clearly holds that a civil contempt order is moot and unreviewable by a court of appeals after the grand jury expires. *In re Grand Jury Proceedings*, 863 F.2d 667 (9th Cir. 1988). It is impossible to reconcile the First Circuit's decision in this case with the Ninth Circuit rule. A contempt order that is moot and without sufficient vitality to permit a court of appeals to review it cannot have sufficient vitality to permit the

entry of a money judgment upon it in the district court. If it is moot in the court of appeals, it must also be moot in the district court.

IMPORTANCE OF THIS CASE

This case is at the point where the law of the first amendment and the law of civil contempt touch one another. The destructive fine in this case is a completely judicial act, arising from the unique law of civil contempt, and thus uniquely represents the judicial extinguishment of a political organization. The extinguishment occurred simply because, of thousands of documents that were produced to a grand jury, certain index cards were alleged not to have been produced.

The First Circuit cited virtually no authority for its decision. The First Circuit did not discuss *McNeil*, *Claiborne Hardware*, *Shillitani*, *United Mine Workers*, and the other directly relevant circuit precedent important to this case, although NDPC clearly made the arguments presented here. Instead, the First Circuit submerged controlling precedent and established new rules that seriously diminish the right of an alleged contemnor, even a political organization, to a fair process, to adequate proof of the alleged contempt, and to moderate and reasonable judicial response to the contempt if it be proved.

The decisions upon which we rely demonstrate that the United Mine Workers and the NAACP would not be treated as harshly, even capriciously, as NDPC has been treated and, like other entities before, we call upon this Court to protect against a diminution, because of political orientation, of a political organization's rights to due process and to adequate proof in circumstances where its existence and first amendment freedoms are threatened.

CONCLUSION

For the foregoing reasons, NDPC requests that the Supreme Court grant a writ of certiorari to the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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August 24, 1989

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APPENDIX

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UNITED STATES COURT OF APPEALS
FIRST CIRCUIT

Nos. 87-1026, 87-1270

IN RE GRAND JURY PROCEEDINGS

APPEAL OF CAUCUS DISTRIBUTORS, INC., *et al.*

Jan. 9, 1989

Decided March 29, 1989

Rehearing Denied May 30, 1989

Michael R. Smith with whom Roger E. Zuckerman, Zuckerman, Spaeder, Goldstein, Taylor & Kolker, Washington, D.C., Michael L. Altman, and Silvergiate, Gertner, Fine & Good, Boston, Mass., were on briefs, for appellants National Democratic Policy Committee, Campaigner Publications and Fusion Energy Foundation.

Barbara A.H. Smith, Boston, Mass., with whom Davis, Robinson & Smith was on brief, for appellant Caucus Distributors, Inc.

Patty Merkamp Stemler, Dept. of Justice, Washington, D.C., with whom Frank L. McNamara, Jr., U.S. Atty., and Peter E. Gelhaar, Asst. U.S. Atty., Boston, Mass., were on the brief, for the U.S.

Before CAMPBELL, Chief Judge, ALDRICH and COFFIN, Circuit Judges.

COFFIN, Circuit Judge.

These are consolidated appeals by four organizations associated with Lyndon LaRouche—Caucus Distributors, Inc. (Caucus), Campaigner Publications, Inc. (Campaigner), Fusion Energy Foundation, Inc. (Fusion), and National Democratic Policy Committee (NDPC)—from partial civil contempt judgments assessed against Caucus in the amount of $6,055,000 and against each of the other three contemnors in the amount of $5,110,000.

Our earlier decision

Since this is a continuation of the proceedings previously considered by us in *In re Grand Jury Proceedings*, 795 F.2d 226 (1st Cir.1986), we repeat our description of the underlying litigation:

> The contempt judgments were imposed by the United States District Court for the District of Massachusetts due to the failure of the appellants to cooperate with a grand jury investigation into possible credit card fraud by these and other LaRouche related entities. These organizations are suspected of obtaining hundreds of thousands of dollars in interest-free loans from credit card banks. The loans were allegedly obtained by fraudulently altering small credit card purchases or donations from persons interested in Lyndon LaRouche to reflect a charge for a large sum. The sums thus obtained were ultimately returned to the credit card bank *sans* accrued interest after the owner of the credit card informed the bank that the charge was not authorized.

Id. at 227-28.

Moreover, since a number of issues sought to be raised here are precluded by the arguments and holdings in that case, we summarize briefly what we then decided. An appeal from an initial contempt judgment (March 29, 1985) assessing the four contemnors a civil fine of

$10,000 a day was dismissed as untimely; this ruling precluded appellants from pursuing their "sole argument," 795 F.2d at 229, against a liquidated partial judgment (April 22, 1985) of $70,000 covering their noncompliance from April 2, 1985 through April 8, 1985. We said, "Since appellants do not contest the actual contempt finding, their appeal of the April 22 judgment fails." *Id.* at 230. A second appeal, this one solely by Caucus, challenged a second liquidated partial judgment (November 22, 1985) of $150,000, covering noncompliance from April 9, 1985 to April 25, 1985. The two grounds asserted—defective service of process and the pendency of appeals from the judgments of March 29 and April 22—fell with our holding the appeal of the March 29 judgment untimely. The pendency of the appeal from the April 22 judgment, covering a different period of time, could not interfere with the second partial judgment.

The third appeal, also by Caucus alone, challenged a contempt judgment (January 22, 1986) fining it an additional $5,000 a day for failing to turn over index cards relating to fundraising activities. We described the controversy as follows:

> Grand jury testimony by the keeper of records had revealed that fund raisers working at Caucus offices around the country kept the names of potential and actual donors on index cards, along with various other information including amounts donated. This information was of particular interest to the grand jury in its investigation into the possible involvement of Caucus in the credit card overcharge scheme. The keeper of the records, however, did not turn these index cards over the grand jury. He claimed that he could not turn the cards over because Caucus was not in possession of the cards. The cards were in the hands of the individual fund raisers, who al-

> legedly considered themselves and were considered by Caucus to be independent consultants rather than employees of Caucus. The fund raisers claimed the cards as their personal property and asserted that both their first and fifth amendment rights could be infringed if they were compelled to turn them over. Caucus fully concurred in and supported the claims of the individual fund raisers.

795 F.2d at 232. The issue on appeal was whether there should have been an evidentiary hearing to allow Caucus opportunity to show that the index cards were personal documents. We held that, under the circumstances, where testimony from fundraisers would have merely repeated the assertions made in detailed affidavits and would likely have resulted only in further delay, the court did not violate due process in deciding the question "whether the cards were sufficiently involved in Caucus' business of fund raising so that they could be considered corporate documents regardless of their prior uses or ownership." *Id.* at 235.

Events subsequent to our earlier decision

Our decision was issued on July 3, 1986. Nothing had happened in the meantime, since the January 22, 1986 contempt judgment against Caucus, except an event unremarked by anyone at the time—the expiration of the grand jury some time in January, 1986. The investigation apparently remained in limbo until June, 1986, when another grand jury was empaneled and resumed work on these matters.

Six days after our opinion issued, the government, on July 9, 1986, wrote both Campaigner and Caucus, referring to our decision and asking them to "produce a legitimate Keeper of the Records with actual knowledge of the records." There was no action forthcoming. On September 1, 1986 the government filed a motion for

partial judgment seeking $6,055,000 from Caucus and $5,110,000 from each of the other contemnors, these amounts covering noncompliance through September 1, 1986. All appellants opposed the motion, claiming that they had complied with all they had been ordered to do.

On October 6, 1986 federal agents searched offices in Leesburg, Virginia, and in Quincy, Massachusetts. Subsequently, pursuant to its expressed intent to supply proof of noncompliance, on November 12, 1986 the government filed an affidavit by FBI Special Agent Martha Wilkes memorializing her personal undercover visits to the Quincy office of Caucus prior to the search and her review of index cards seized at Leesburg. The salient facts averred were:

—at Quincy she saw thousands of index cards, naming potential contributors;

—a Caucus employee told her the cards were used for fundraising and that "the organization" was "inputting" the index card information into a computer linked with another in Leesburg;

—on October 6, FBI and Secret Service agents searched "the contemnors' offices" in Quincy and Leesburg and seized thousands of index cards;

—her examination of many cards from Quincy showed notations, usually by more than one person, indicating their existence prior to February 1, 1985, the date of the subpoena being February 6;

—her review of a sample of cards from Leesburg showed notations to similar effect;

—the claim of Caucus, in its opposition paper, that individuals controlled the custody of the index cards and refused to turn them over was false because "the contemnor organizations had custody of literally thousands of index cards."

To this affidavit were attached seven of the cards seized at Quincy. The notations were difficult to decipher but two contained clear references to NDPC and two, possibly three, had references to Fusion.

Appellants moved for a stay, alleging the likelihood of prejudice because of then pending criminal proceedings. The court denied the stay on December 12, 1986, but gave contemnors twenty days in which to respond to the Wilkes affidavit. On the twentieth day, January 1, 1987, contemnors asked for an extension until January 9 to prepare their responses. But instead of responding, on January 9 Caucus and Campaigner noticed an appeal from the denial of stay. On January 19 Fusion and NDPC, in a supplementary memorandum, merely argued that they had produced a mass of documents and that "no one had ever contended" that the index cards had belonged to them. On February 26, 1987 the court, after concluding that nothing had been submitted to contradict facts set forth in the Wilkes affidavit, entered its contempt judgments.

Analysis

A number of issues may be considered together. They encompass challenges to the procedure, impact and amount of the fines, the coverage of the initial contempt judgment, and the adequacy of the Wilkes affidavit. What these issues have in common is that they are affected, indeed profoundly controlled, by the history of these cases. A final issue is unrelated to anything that has been decided in the past: does an order for daily coercive fines for failure to produce documents have validity beyond the existence of the grand jury before which the documents were ordered to be produced?

Appellants advance the following arguments attacking the fines assessed by the district court: that the fines of five and six-plus million dollars are excessive; that no particularized decisionmaking has taken place, *e.g.*, that there was no specific focus on the government's loss, no

weighing of the degree of noncompliance or of the financial impact on the contemnors; that no periodic review has been undertaken of the appropriateness of the fines; and that there was no articulated basis for decision. To these can be added the claims that the initial subpoena did not specify "index cards" and that the Wilkes affidavit made no mention of Campaigner, Fusion, or NDPC and their custody of index cards.

All of these arguments might at one time have been worth making. But time and decision have preempted them. The excessiveness of the fines is not presently an available issue; the time to have complained was when the daily rate was set. *Cf. In re Grand Jury Witness (Arambulo)*, 835 F.2d 437, 443 (2d Cir.1987). And, as we have noted, not only was the appeal from that initial ratesetting judgment held to be untimely, but also the only challenge sought to be raised by that appeal was defective service of process. The current challenges—to the failure to make specific judgments about the loss to the government, the extent of noncompliance, the financial impact on the contemnors, the absence of periodic review or of an articulated basis of decision—all fall because of the lack of any prior, timely challenge. These are ideas trundled out for the first time on this appeal.

Appellants mount a parallel argument, claiming that the very size and supposed destructiveness of the fines assessed in the order of February 26, 1986, after the government had seized the index cards and some of them had been burned, after an indictment had been returned against Campaigner and Caucus, and after the investigation had ended, made the sanctions punitive, thus invoking all of the rights given a witness charged with criminal contempt. Such a claim overlooks prior history: the valid early assessment of the fines, contingent on continued refusal to comply; the continued failure to render full compliance even after the district court in its May 21, 1985 hearing held out the possibility of forgiveness if

full compliance were forthcoming; the subsequent failure of appellants to seek any alteration or termination of the daily fines prior to the government's final motion for partial summary judgment. We agree with the government that the court's action on February 26, 1986 was not the imposition of a punitive fine but the recognition and liquidation of the debt accumulated during the period of noncompliance. As the government cogently argues, to allow appellants to avoid the consequences of their civil contempt solely because, at the date of reckoning, compliance is impossible would only encourage stonewalling.

Additional arguments, not concerning the fixing of the fines, have been made. One was that the subpoena did not clearly and specifically target "index cards." It merely said "any and all records relating to fund raising." Another claim was that the Wilkes affidavit named only Caucus as a party of ownership, and that the remaining allegations were hearsay or fell below an acceptable standard of proof. As to the sufficient specificity of "any and all records relating to fund raising" to include index cards, here again, not only before but after the subpoenas were held enforceable, the argument was never made in the court below that "any and all" did not include index cards. Any hesitation we might have is neutralized by the fact that as early as November, 1985 the government made clear to Caucus its contention that index cards were central to its request. In its motion to compel production, it cited the concession of a key Caucus employee, its record keeper, on October 29, 1985, that index cards were covered by the subpoena.

The remaining issues concern the validity and sufficiency of the Wilkes affidavit. We dispose first of arguments that the affidavit was defective because of hearsay and because it did not constitute clear and convincing proof. These arguments were not made in the district court and we therefore do not deal with them here. The major attack on the affidavit is that, in light of the fact

that in the past only Caucus was linked to the index cards, the affidavit's reference to "contemnors' offices" was too slender a reed on which to base sanctions against the other three organizations, at least without an evidentiary hearing.

These contentions diminish in substance as we consider the way in which the issues involving the affidavit developed. Prior to the filing of the affidavit, each contemnor had filed an opposition to the government's September 1, 1986 motion for partial judgment, each asserting it had fully complied with its obligations to produce documents and a record keeper. The issue of compliance narrowed, however, after the filing of the Wilkes affidavit. The assertions in the affidavit of the large numbers of cards found in "contemnors' offices" and of the custody of thousands of index cards by "the contemnor organizations," many of these cards predating the issuance of the subpoena, with the attached sample cards referencing NDPC and Fusion, changed the focus to the asserted failure of contemnors to produce index cards prior to their seizure.

The court, fully aware of the new focus, granted, as we have seen, twenty days to allow contemnors to respond. Two contemnors, Caucus and Campaigner, elected not to respond but to attempt to appeal the denial of a stay. Fusion and NDPC merely reiterated that they had produced massive documentation. Their only reference to index cards was that in the past no one had ever contended that they were connected with them. *There was no affidavit denying such connection*, nor any disavowal of references to them in the cards attached to the Wilkes affidavit. Under these circumstances we see no abuse of discretion or violation of due process in proceeding, after such an absence of invited factual response, to decision without an evidentiary hearing.

Post-grand jury running of civil fines

Much more substantial, not in any way implicated in any prior holding or argument in this case, is the claim that a judicial order imposing a continuing per diem fine does not have a longer life than the grand jury for which the order was issued. In this case, the fines attributable to the period before the demise of the grand jury amounted to roughly $2,710,000 for Campaigner, Fusion, and NDPC—instead of $5,110,000.[1] The fine for Caucus, before the termination of the grand jury, was approximately $2,510,000. The added, post-grand jury fine was approximately $3,545,000.[2]

The government acknowledges that the survival of civil contempt sanctions beyond the life of a grand jury for which the sanctions were to compel production of evidence is one of first impression. But it argues that where an investigation is continued by a second grand jury, termination of the first grand jury is "a mere technicality." It points out that, unlike 28 U.S.C. § 1826(a)(2) which limits the incarceration of a witness for civil contempt to "the term of the grand jury including extensions," there is no statute limiting the duration of coercive fines. Fines, it argues, do not implicate the concerns attending the loss of liberty through incarceration. It then notes that there is "nothing magical" about the first grand jury; it did not issue the subpoenas—the prosecutor filled

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[1] We take an approximate figure of 240 days between January 1 and September 1, 1986, multiply it by $10,000 a day, and arrive at $2,400,000, which, when subtracted from $5,110,000 yields $2,710,000.

[2] Noncompliance from April 25, 1985 through December 31, 1985, or 251 days, at $10,000 a day equals $2,510,000. Noncompliance from January 1 through January 23, 1986 at $10,000 a day equals $230,000. Noncompliance from January 24 through September 1, 1986 or 221 days at $15,000 a day equals $3,315,000. The total is $6,055,000. $6,055,000 minus $2,510,000 equals $3,545,000.

out the forms provided by the clerk of the court and a marshal served them. Subpoenas may be served prior to the impanelling of a grand jury. *United States v. Stevens*, 510 F.2d 1101, 1106 (5th Cir.1975). And a subpoena issued by one grand jury may be used to obtain evidence for a second grand jury. *In re Grand Jury Proceedings (Sutton)*, 658 F.2d 782, 783 (10th Cir.1981). Finally, the government argues, a witness may comply with a subpoena even after the termination of a grand jury by turning over requested records to the prosecutor. The accumulation of daily fines would cease with the return of an indictment, the running of the relevant statute of limitations, or the termination of the investigation.

With due regard to these arguments, we resist the invitation to adopt a rule that would extend the running of civil contempt fines beyond the life of the original grand jury. We see little inconvenience to the government, if a first grand jury is unable to complete its investigation, in seeking a new adjudication of civil contempt during the term of a successor grand jury. And we see grave problems lurking in allowing the civil fine meter to continue running until somehow it is determined that an investigation has ceased.

First, while the statutory scheme does not speak directly to the present problem, its basic thrust seems to contemplate that a grand jury's work—and therefore the district court's coercive power to enable the grand jury to do its work—ends with the life of the grand jury. Prior to the 1983 amendment of Fed.R.Crim.P. 6(g), a grand jury could serve no longer than eighteen months. That amendment allowed a court to extend the life of a grand jury for up to six months if the public interest so warranted. As the Notes of the Advisory Committee on Rules elaborate:

> This permit some flexibility but reflects the fact that extension of regular grand juries beyond 18 months

> is to be the *exception* and not the norm. The intention of the amendment is to make it possible for a grand jury to have sufficient extra time to wind up an investigation when for example, such extension becomes necessary because of the unusual nature of the case or unforeseen developments.

Fed.R.Crim.P. 6(g) advisory committee's note to 1983 amendment (emphasis added).

The intention to give a grand jury "extra time to wind up an investigation" rubs against a judicially created extension of a grand jury's sanction power beyond the "extra time" given by the rule. We are reinforced in this belief by the quite different provisions of the Organized Crime Control Act of 1970, Title I, 18 U.S.C. §§ 3331-3334. Section 3331, for example, allows a court to extend the life of a special grand jury, if its business has not been completed, up to a total term of thirty-six months. And, under § 3333(e), in investigations of misconduct involving appointed public officials and of organized crime conditions, a special grand jury's term may be extended beyond thirty-six months for the taking of needed additional testimony. Here, too, we are reluctant to add to a grand jury's powers where Congress has shown that it knows how to act.

Such case law as there is suggests a termination of coercive power with the final discharge of a grand jury. In a case preceding the current statute, *Shillitani v. United States*, 384 U.S. 364, 86 S.Ct. 1531, 16 L.Ed.2d 622 (1966), the Court was dealing with a civilly contumacious witness whose incarceration continued after the grand jury was discharged. It observed that the justification of coercive imprisonment depended "upon the ability of the contemnor to comply with the court's order." *Id.* at 371, 86 S.Ct. at 1536. Such a justification disappears when a witness "has no further opportunity to

purge himself of contempt." *Id.*[3] The government, as we have noted, argues that in the instant case the contemnors do have an opportunity to purge themselves by delivering the records to the prosecutor.

We are troubled by the suggestion to construe *Shillitani* so narrowly. In the first place, the Court's opinion ended with the broad statement, "Once the grand jury ceases to function, the rationale for civil contempt vanishes, and the contemnor has to be released." *Id.* at 372. In the second place, the Court's reference to "the doctrine that a court must exercise '[t]he least possible power adequate to the end proposed' " seems as applicable to coercive fines as to imprisonment, as does its recognition that sanctions may be "continued or reimposed" if a witness adheres to his refusal to comply before a successor grand jury. *Id.* at 371 n. 8 (citation omitted).

The Court of Appeals for the Second Circuit in *United States v. First National City Bank*, 396 F.2d 897 (2d Cir.1968), is the only court we are aware of to pronounce explicitly on the inability of civil fines to survive the demise of the issuing grand jury. In commenting on a $2,000 per day civil fine against a bank and the civil imprisonment of an individual, it said with regard to both, "the punishment could not extend beyond the expiration of the life of the Grand Jury." *Id.* at 900 n. 9. The government discounts this as dictum. Whether that is so or not, the statement is a deliberate one, its seriousness underscored by the action of the court (upholding the sanctions) in directing that mandate issue forthwith

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[3] A number of cases hold that a civil contemnor may not remain incarcerated beyond the life of the grand jury: *United States v. Petito*, 519 F.Supp. 838, 842 (E.D.N.Y. 1981), *aff'd*, 671 F.2d 68 (2d Cir. 1982); *In re Grand Jury Investigation (Braun)*, 600 F.2d 420, 425 (3d Cir. 1979); *In re Grand Jury Proceedings (Shocker)*, 541 F.2d 464, 465 (5th Cir. 1976); *cf. Yates v. United States*, 355 U.S. 66, 78 S.Ct. 128, 2 L.Ed.2d 95 (1957); *see also Loubriel v. United States*, 9 F.2d 807 (2d Cir. 1926).

"[s]ince the life of the Grand Jury is rapidly drawing to a close." *Id.* at 905. More recently, the same court has indicated: "The policy underlying civil contempt under [18 U.S.C. § 1826] is the same whether confinement is ordered or fines were imposed." *In re Grand Jury Witness*, 835 F.2d 437, 442 (2d Cir.1987).

Perhaps our most significant difficulty lies in contemplating how, when witnesses have been subpoenaed, as here, both "to appear . . . to testify" and to bring documents to a specific grand jury and that jury has been discharged, a court would handle attempts to purge. If, as the Court of Appeals for the Seventh Circuit has observed, "[R]ecipients of the subpoenas could choose to exercise their right to appeal before the grand jury themselves, rather than decide merely to relinquish the records to the [law enforcement officials]," *United States v. McComb*, 744 F.2d 555 (7th Cir.1984), that choice is no longer available. Apart from this, a court would be placed in the anomalous position of determining whether the response of a witness in supplying or failing to supply documents facilitated or frustrated the work of a grand jury that no longer existed. If we were to envisage the court determining whether the investigation were still "ongoing," such as to merit the daily accumulation of very substantial fines, we would have to face a host of problems. Such problems would include: how much and what evidence of continued activity is necessary, how immediate would the convening of another grand jury have to be, a standard for judicial review, a guarantee against prosecutorial vindictiveness or arbitrariness, a means of preventing contemnors from being unfairly lulled by prosecutorial inaction, etc. Particularly since it would be relatively simple—and clear cut—for a successor grand jury to reimpose coercive sanctions, we prefer not to enter this thicket.

The government's fear that witnesses will be led to "wait out" a grand jury's life does not seem substantial.

While "waiting out," their daily fines accumulate. Moreover, there is nothing to prevent the prosecution, aware of the forthcoming expiration of a grand jury, from coming into court seeking liquidated partial judgment. Then too, new and perhaps more burdensome sanctions may be imposed by a successor grand jury. And the court always has available the sanction of criminal contempt. As Judge Magruder said for our court, "But the required vacation of the remedial order . . . does not trench upon the power of the court, in a proper case, to vindicate its own authority by punishment of an offender for a criminal contempt." *Parker v. United States*, 153 F.2d 66, 77 (1st Cir.1946). *See also United States v. Professional Air Traffic Controllers*, 678 F.2d 1, 4 (1st Cir. 1982).

* * * *

We, therefore, vacate the judgments and, since the exact date of expiration of the initial grand jury is not revealed by the record, remand these cases to the district court for computation of the aggregate fines in accordance with our opinion.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

M.B.D. Nos. 85-203-206

IN RE: GRAND JURY PROCEEDINGS

(CAUCUS DISTRIBUTORS, INC.,
CAMPAIGNER PUBLICATIONS, INC.,
FUSION ENERGY FOUNDATION,
NATIONAL DEMOCRATIC POLICY COMMITTEE)

MEMORANDUM AND ORDER

Mazzone, D.J. February 24, 1987

This matter is again before the Court on the motion of the United States for partial summary judgment and, incident to that motion, a motion by the United States to disregard the notice of appeal filed by the contemnors Caucus Distributors, Inc. and Campaigner Publications, Inc. The relevant chronological background of this case is as follows.

On December 12, 1986, this Court denied the contemnors' motion to stay these civil contempt proceedings pending resolution of a related criminal case. The Court's Memorandum and Order of December 12, 1986 set forth the detailed factual background in these proceedings, and this background need not be repeated here. The contemnors were allowed twenty days to respond to an affidavit of FBI Special Agent Martha Wilkes regarding her undercover investigation and her analysis of index cards seized in searches of the contemnors' offices in Quincy, Massachusetts and Leesburg, Virginia.

The contemnors moved, on January 2, 1987, for an additional seven days in which to respond to the Wilkes affidavit, stating that the extra time was required to

obtain and examine material pertaining to related proceedings. The motion was allowed on January 5, 1987. At the end of the seven-day extension, the contemnors filed a notice of appeal of this Court's December 12, 1986 order denying the motion for a stay of the proceedings. The contemnors did not file a response to the Wilkes affidavit.

I.

First, as to the government's motion to disregard the notice of appeal. The contemnors predicate their appeal upon 28 U.S.C. § 1292(a)(1) which provides that the courts of appeals shall have jurisdiction of appeals from interlocutory orders of the district courts of the United States "[g]ranting, continuing, modifying, refusing or dissolving injunctions. . . ." The contemnors argue that "substantial constitutional claims, including their right against self-incrimination and their Sixth Amendment right to a fair trial, will be irreparably harmed should they respond to the Court's order that they respond to the Wilkes affidavit." Opposition to United States' Motion to Disregard Contemnors' Notice of Appeal, p. 2.

The stated rule in this circuit is that

> ordinarily, a decision by a district court to stay litigation before it pending developments in a different action involving the same issue is not appealable. Such a highly discretionary 'stay' decision (citation omitted) is neither 'final' nor equivalent to an 'injunction.' It thus provides no basis for an appeal under either [28 U.S.C.] § 1291 or [28 U.S.C.] § 1292(a).

Acton v. *Borden, Inc.*, 670 F.2d 377, 380 (1st Cir. 1982), *citing Harmon-Kardon, Inc.* v. *Ashley Hi-Fi*, 602 21, 22 (1st Cir. 1979); *Codex Corp.* v. *Milgo Electronics Corp.*, 553 F.2d 735, 737 (1st Cir. 1977); 9 *Moore's Federal Practice* ¶ 110.20[4.-2] at 249, 250. The court in *Acton Corp.* delineated five categories of exceptions to this gen-

eral rule of nonappealability: (1) "collateral order" cases, which allow an appeal where there is an important claim of right collateral to rights asserted in the main cause of action which may be lost if appellate consideration is delayed; (2) appeals from stays entered to permit state courts to consider potentially determinative issues of state law; (3) cases involving appealability of orders staying, or refusing to stay, arbitration proceedings; (4) appeals from stay orders entered in suits where a party has sought preliminary injunctive relief; (5) appeals from stay orders that effectively terminate the actions in which they are granted. 670 F.2d at 380-381.

The contemnors' request for an appeal does not appear to fall within any of these categories, although I do recognize the contemnors' claim that certain of their rights might be threatened with irretrievable loss if appellate review is postponed. As I stated in my Memorandum and Order of December 12, 1986, however, the contemnors' assertions as to these rights are not compelling enough to merit further delay in these proceedings. The concerns of the contemnors may be handled by the judge presiding in a criminal case. The rights of the contemnors are not subject to irretrievable loss, as the trial judge in the criminal case has the authority and discretion to exclude the use of any evidence generated in these proceedings against the contemnors, if such exclusion is proper and necessary to ensure a fair trial.

I conclude, therefore, that the order of December 12, 1986 at issue here is "manifestly unappealable," *United States* v. *Ferris*, 751 F.2d 436, 440 (1st Cir. 1984) and that jurisdiction is properly vested in this Court. The motion to disregard the notice of appeal is granted.

II.

Turning, then, to the motion for partial summary judgment, the uncontroverted record shows that the critical index cards called for by the subpoena were not produced, although clearly available for production to the grand

jury. Indeed, after service of the subpoena, the record further shows that many of the index cards were burned.

The affidavit of Agent Wilkes indicates that, acting in an undercover capacity on September 23 and 24, 1986 at the Quincy, Massachusetts office of Caucus Distributors, Agent Wilkes observed thousands of index cards listing names and addresses of potential contributors. On September 24, 1986, Agent Wilkes was told by Caucus employee William Curran that the index cards were used for fundraising, that the cards are kept as long as the donor whose name appears on the card continues to participate, and that the organization was in the process of inputting the contents of the cards onto the organization's computer which was linked to another computer in Leesburg, Virginia. Agent Wilkes also conducted an analysis of index cards seized in searches of the contemnors' offices in Quincy, Massachusetts and Leesburg, Virginia on October 6, 1986. This analysis revealed that many of the cards found in these offices contain notations indicating that the index cards existed prior to February 1, 1985, and thus that these cards predated the February 6, 1985 federal grand jury subpoena calling for the production of these cards.

While a supplemental memorandum in opposition was filed on January 15, 1987 on behalf of the National Democratic Policy Committee and Fusion Energy Foundation, no factual issue material to this matter was put in dispute. Rather, the memorandum and attachments were devoted to a reprise of earlier arguments. Further, there has been no compliance with the procedure mandated by Local Rule 18.

On this record, I accept the verified and undisputed facts of the Wilkes affidavit and, accordingly, the motion for partial summary judgment is allowed.

SO ORDERED.

/s/ A. David Mazzone
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

M.B.D. Nos. 85-203-206

IN RE: GRAND JURY PROCEEDINGS

(CAMPAIGNER PUBLICATIONS, INC.,
FUSION ENERGY FOUNDATION,
NATIONAL DEMOCRATIC POLICY COMMITTEE,
CAUCUS DISTRIBUTORS, INC.)

ORDER OF PARTIAL JUDGMENT

Upon motion of the United States of America and review of the record before it, the Court finds that Campaigner Publications, Inc., Fusion Energy Foundation, National Democratic Policy Committee and Caucus Distributors, Inc., as of the close of business on September 1, 1986, have failed to comply with the grand jury subpoenas served upon them by the United States. In accordance with the terms of the Judgment and Commitment entered by the Court on March 29, 1985, and also in the case of Caucus Distributors, Inc., the Further Judgment and Commitment entered January 22, 1986, it is hereby

ORDERED that partial judgment enter in favor of the United States against the above-stated contemnors as follows:

1. Partial judgment shall and is hereby entered against Campaigner Publications, Inc., in the amount of $5,110,000 for its failure to comply with the grand jury subpoena from April 9, 1985 to and including September 1, 1986;

2. Partial judgment shall and is hereby entered against Fusion Energy Foundation in the amount of $5,110,000 for its failure to comply with the grand jury subpoena from April 9, 1985 to and including September 1, 1986;

3. Partial judgment shall and is hereby entered against National Democratic Policy Committee in the amount of $5,110,000 for its failure to comply with the grand jury subpoena from April 9, 1985 to and including September 1, 1986; and

4. Partial judgment shall and is hereby entered against Caucus Distributors, Inc., in the amount of $6,055,000 for its failure to comply with the grand jury subpoena from April 25, 1985 to and including September 1, 1986.

This Order shall be in addition to this Court's previous Orders of Partial Judgment. Further Orders of Partial Judgment may issue as appropriate unless and until the contemnors comply with this Court's prior orders.

/s/ P. David Mazzone
United States District Judge

DATED: February 26, 1987

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 87-1026
87-1270

IN RE: GRAND JURY PROCEEDINGS

CAUCUS DISTRIBUTORS, INC., *et al.*

JUDGMENT

Entered: March 29, 1989

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgments of the District Court are vacated and the causes are remanded to the District Court for computation of the aggregated fines in accordance with the opinion filed this date. No costs.

By the Court:

/s/ Francis P. Scigliano
Clerk.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 87-1026

IN RE: GRAND JURY PROCEEDINGS,

CAUCUS DISTRIBUTORS, INC., *et al.*,
Appellants.

No. 87-1270

IN RE: GRAND JURY PROCEEDINGS,

CAUCUS DISTRIBUTORS, INC., *et al.*,
Appellants.

Before

Campbell, *Chief Judge*,

Aldrich and Coffin, *Circuit Judges*.

ORDER OF COURT

Entered: May 30, 1989

Upon consideration of the petition for rehearing by the National Democratic Policy Committee,

It is ordered that said petition for rehearing be denied.

By the Court:

/s/ Francis P. Scigliano
Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

M.B.D. Nos. 85-203-206

IN RE: GRAND JURY PROCEEDINGS

(CAUCUS DISTRIBUTORS, INC.,
CAMPAIGNER PUBLICATIONS, INC.,
FUSION ENERGY FOUNDATION,
NATIONAL DEMOCRATIC POLICY COMMITTEE)

AFFIDAVIT OF MARTHA G. WILKES

I, Martha G. Wilkes, being first duly sworn, depose and say as follows:

1. I am a Special Agent of the Federal Bureau of Investigation ("FBI") and based upon matters learned by me in the course of my duties, I make this affidavit in further support of the United States Motion for Partial Judgment filed on September 8, 1986.

2. On September 23 and 24, 1986, acting in an undercover capacity, I entered into the Quincy, Massachusetts office of Caucus Distributors, Inc. ("Caucus"), which is one of the contemnor organizations referred to in the above motion. During my two evening visits there, I observed on the premises thousands of index cards with names and addresses of potential contributors. Moreover, on September 24, 1986, I spoke to Caucus employee William Curran about the index cards present on the premises. Mr. Curran told me, among other things, that: (1) the index cards were used for fundraising; (2) the index cards are kept for as long as the donor whose name appears on the card continues to participate; and

(3) the organization was in the process of inputting the contents of the index cards on the organization's computer which, Mr. Curran explained, was linked with another computer in Leesburg, Virginia.

3. On October 6, 1986, agents of the FBI and Secret Service conducted searches of the contemnors' offices in both Quincy, Massachusetts and Leesburg, Virginia. During the course of these two searches, thousands of index cards were seized. All of these cards were on the premises of the two offices.

4. In the Quincy office alone, four full boxes containing thousands of index cards were seized. I have personally examined these cards. Most of the index cards contain handwriting which appears to be of more than one person. Moreover, over one hundred and fifty of the index cards at the Quincy office have handwritten notations indicating that the index cards existed prior to February 1, 1985. Thus, these index cards predated the federal grand jury subpoena which called for the production of these cards, which subpoena was dated February 6, 1985. Attached hereto are true copies of seven index cards which were found at the Quincy office and which are representative of the index cards in existence prior to February 1, 1985.

5. In connection with the Leesburg, Virginia search, I have reviewed a sample of these cards. My review shows that, like the index cards found in the Quincy office, many of the cards found in the Leesburg office: (1) contain handwriting appearing to belong to more than one person; and (2) are dated prior to the February 6, 1985 subpoena. I personally observed some index cards which had notations dated 1983 and many more dated 1984.

6. None of the index cards referred to in this affidavit have previously been turned over to the grand jury.

7. I am informed that in its opposition papers, one of the contemnors, Caucus, stated:

> It is true that all of the index cards have not been turned over to the grand jury. While the District Court has ruled that the index cards are within the control of [Caucus], the respondent must again assert that the individuals who have custody and control of the index cards have refused to turn them over and, thus, [Caucus] is powerless to comply with this aspect of the subpoena *duces tecum*. [Caucus Opposition, page 3, para. 5, dated October 7, 1986.]

8. Based on the above searches, my review of the seized index cards, and my personal visits to the Quincy office on September 23 and 24, 1986, the above-quoted assertion is patently false because at the very time the above quoted assertions were being made—October 7, 1986—the contemnor organizations had custody of literally thousands of index cards which they therefore had the power to produce pursuant to the grand jury subpoenas.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on November 12, 1986.

/s/ Martha G. Wilkes
MARTHA G. WILKES
Special Agent
Federal Bureau of Investigation

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

M.B.D. No. 85-205

IN RE: GRAND JURY PROCEEDINGS
(NATIONAL DEMOCRATIC POLICY COMMITTEE)

AFFIDAVIT OF WARREN HAMERMAN

COMMONWEALTH OF VIRGINIA)
) ss.:
COUNTY OF LOUDOUN)

WARREN HAMERMAN, being duly sworn, deposes and says:

1. I am the Chairman of the National Democratic Policy Committee (NDPC) and have served in this capacity at all times relevant to the grand jury subpoena under consideration herein. I make this affidavit in opposition to the United States' Motion for Partial Judgment dated September 8, 1986.

2. I have read the instant motion which seeks $5,110,000 in contempt fines from the NDPC on the basis that the organization has not "produced all records in [its] possession, custody, or control" as requested by the grand jury subpoena (paragraph 3a) and the NDPC has not produced a proper recordkeeper (Paragraph 3b). These allegations are untrue and completely misrepresent the NDPC's record of compliance.

3. The NDPC is a multicandidate political action committee registered with the Federal Election Committee. As Chairman of the organization, I am primarily a

political functionary who promotes and represents the policies and programs of the NDPC to the electorate as well as the general public. To perform its basic administrative tasks, the NDPC relies upon volunteers who support the policies and programs of the political/electoral organization. The NDPC does not have a recordkeeper, a recording secretary, or a permanent staff of people who are responsible for maintaining documents.

4. The principal recordkeeping functions of the NDPC are to document the organization's contributions and expenditures so that periodic reports can be made to the Federal Election Commission as required by federal law. The sole financial documents in its possession are the FEC records and the underlying raw data which reflect contributions and expenditures.

5. On April 4, 1985, the NDPC, through its attorney, accepted service of a subpoena duces tecum issued by a federal grand jury in the District of Massachusetts. Since the NDPC did not have an official recordkeeper, I searched for a volunteer who would serve as the recordkeeper and who would present the requested documents to the grand jury.

6. On or about April 17, 1985, I contacted Mr. Richard Black, an NDPC volunteer residing in the Boston, Massachusetts area and asked Mr. Black if he would appear before the grand jury and identify and present the NDPC records. Mr. Black consented to my request.

7. On or about April 18, 1985, Mr. Black appeared before the grand jury and produced several cartons of financial records, including reports to the Federal Election Commission and thousands of credit card contribution slips.

8. On or about May 14, 1985, Mr. Black appeared before the grand jury and produced more boxes of credit card contribution slips containing several thousand individual slips.

9. During a hearing convened on May 21, 1985 to adjudicate various applications made in connection with the grand jury proceedings, the record of NDPC document production was described to the Court and Assistant United States Attorney, Daniel Small, conceded that there had been substantial compliance. The nature of the NDPC was explained to the Court which then directed the NDPC counsel to supply Mr. Small with the name of a responsible officer. This directive was complied with three days later in a correspondence from counsel for the NDPC to Mr. Small in which I was identified as the responsible officer.

10. Or about June, 1985, Mr. Black appeared once again before the grand jury and produced several thousand more documents, including invoices, receipts, deposit slips, bank statements, cancelled checks, photocopies of deposited checks, and more credit card chits.

11. The NDPC, which relied upon the labors of volunteers, made good faith efforts to produce the subpoenaed documents as expeditiously as possible. Within 2-3 months of the acceptance of service, the NDPC assembled and produced an estimated tens of thousands of financial records for the grand jury in Boston, Massachusetts. To the best of my knowledge, the NDPC fully complied with the grand jury subpoena and produced all documents responsive thereto within its possession, on or before the end of June, 1985.

/s/ Warren Hamerman
WARREN HAMERMAN

Sworn to before me this 30th day of September, 1986.

/s/ Mary Jane Freeman
Notary Public

My Commission Expires
March 24, 1989

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

M.B.D. No. 85-205

IN RE: GRAND JURY PROCEEDINGS

(NATIONAL DEMOCRATIC POLICY COMMITTEE)

SUPPLEMENTAL AFFIDAVIT OF WARREN HAMERMAN

COMMONWEALTH OF VIRGINIA)
) ss.:
COUNTY OF LOUDOUN)

WARREN HAMERMAN, being duly sworn, deposes and says:

1. I am the Chairman of the National Democratic Policy Committee (NDPC) and have served in this capacity at all times relevant to the grand jury subpoena under consideration herein. I make this affidavit to supplement my previously submitted affidavit in opposition dated September 30, 1986.

2. On December 19, 1986, FBI Special Agent Richard Egan, the supervising agent of the investigation at issue, testified at the pretrial detention hearing of Edward Spannaus, Robert Greenberg, and John Scialdone. See *United States v. Spannaus, et al.* CR-86-323-K-16, 17, 18, pertinent portions of the transcript are annexed hereto as Exhibit A.

3. During the course of Mr. Egan's testimony, the defendants introduced into evidence a seven page document entitled "Grid of Record Production by Keeper/ Organization." This document, a copy of which is annexed hereto as Exhibit E, schematically represents the record production of six organizations subpoenaed by the federal grand jury at issue in the government's motion for partial judgment. The NDPC is one of the six organizations listed.

4. When confronted by this document, Mr. Egan recanted previous testimony made at another detention hearing that these organizations had failed to produce any records to the grand jury. In regard to that previous testimony, Mr. Egan said "I was wrong and there (it?) was a mistake." Exhibit A, p. 25.

5. In support of Mr. Egan's correction of the record, Assistant United States Attorney John Markham stated "[t]he government's prepared to stipulate that . . . various LaRouche organizations produced a wealth of material. It's never been our contention that they didn't produce it." Exhibit A, p. 26.

6. Further, Mr. Markham conceded that he had no objection to the introduction into evidence of the defendants' grid: "I have no objection, Your Honor, and I'll look at it over the lunch break. They produced a whole lot of records—". Exhibit A, p. 27.

7. The Grid of Record Production demonstrates that in April 18, 1985; May 14, 1985; and June 27, 1985, the NDPC keeper appeared before the grand jury and produced folders and boxes of financial records. This corroborates the assertions I made in my original affidavit filed in opposition.

8. On December 19, 1986, Special Agent Egan also testified that there were problems with the service of the

grand jury subpoenas and that these subpoenas were not served in an in-hand manner. Exhibit A, p. 154-6.

/s/ Warren Hamerman
WARREN HAMERMAN

Sworn to before me this
13th day of January, 1987.

/s/ George Canning
My Commission Expires July 27, 1990.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

M.B.D. Nos. 203-206

IN RE: GRAND JURY PROCEEDINGS

(CAUCUS DISTRIBUTORS, INC., _
CAMPAIGNER PUBLICATIONS, INC.,
FUSION ENERGY FOUNDATION, AND
NATIONAL DEMOCRATIC POLICY COMMITTEE)

OPPOSITION TO MOTION FOR PARTIAL JUDGMENT, LEAVE TO SUBSTANTIATE COMPLIANCE AND REQUEST FOR HEARING ON MOTION TO PURGE

Respondents in this matter hereby oppose the Government's Motion for Partial Judgement and request leave for additional time to substantiate compliance with the subpoenas in question. In addition, respondents request a hearing on both the Government's motion and it's still pending motion to purge contempt filed on April 4, 1985. In support of these requests, respondents state that:

1. They need additional time to present affidavits and other documentation to substantiate their compliance with the subpoenas, including not only what has long since already been produced but also to rebut the Government's unsupported claim that they have not produced all records requested.

2. After additional documentation can be presented, they wish to be heard on the allegations contained in the Government's motion as well as their own claim, initially

made on April 4, 1985, that they be purged of the underlying contempt.

WHEREFORE, respondents request three weeks to present evidence to substantiate their claim of full compliance and thereafter that this Court convene a hearing on this motion and their motion to purge.

By Their Attorneys,
(Local Counsel)

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

M.B.D. No. 85-205

IN RE: GRAND JURY PROCEEDINGS

(NATIONAL DEMOCRATIC POLICY COMMITTEE AND FUSION ENERGY FOUNDATION)

SUPPLEMENTAL MEMORANDUM OF THE NATIONAL DEMOCRATIC POLICY COMMITTEE AND THE FUSION ENERGY FOUNDATION IN OPPOSITION TO THE GOVERNMENT'S MOTION FOR PARTIAL JUDGMENT

This supplemental memorandum is submitted on behalf of the National Democratic Policy Committee (NDPC) and the Fusion Energy Foundation (FEF) in opposition to the government's motion for partial judgment dated September 8, 1986. The government has not in any way refuted the affidavits of Warren Hamerman, the Chairman of the NDPC, and Paul Gallagher, the Executive Director of FEF. The government's motion for partial judgment should be denied for the reasons previously stated in the initial Hamerman and Gallagher affidavits, and for the following additional reasons:

1. The entire evidentiary showing of noncompliance is the affidavit of Martha Wilkes, which contends that index cards found during searches conducted in Boston, Massachusetts and Leesburg, Virginia were not produced to the grand jury. In fact, the legal status of these cards has been the subject of a major constitutional dispute between the government and Caucus Distributors, Inc. (CDI). A petition for certiorari, on this and other issues, is now pending in the U.S. Supreme Court. During the course

of this dispute, no one has ever contended that the cards belong to either NDPC or FEF.

2. As detailed in the attached supplemental affidavits of Warren Hamerman and Paul Gallagher, the government conceded during the December 19, 1986 detention hearing of Edward Spannaus, Robert Greenberg, and John Scialdone that the subpoenaed organizations, inclusive of NDPC and FEF, have "produced a wealth of material. It's never been our contention that they didn't produce it." Supplemental Affidavit of Warren Hamerman, Paragraph 5. Elsewhere in the same transcript, the government admits "they produced a whole lot of records". Hamerman, Paragraph 6.

3. Further, oral testimony elicited from FBI Special Agent Richard Egan at the December 19, 1986 detention hearing corroborates the allegations of improper service contained in the April 3, 1985 motions to vacate filed by NDPC and FEF. Hamerman, Paragraph 7.

4. The government's own original and superceding indictments provides additional support that FEF was not properly served in that these indictments admit FEF had moved out of its New York headquarters in December, 1984, at least one month prior to the first attempt at service. Supplemental Affidavit of Paul Gallagher, Paragraph 3.

5. The government tacitly conceded that FEF did provide the government with the correct address of its Executive Director on May 22, 1985. Gallagher, Paragraphs 4-5.

The government's motion against these parties is completely without merit. The government asks this Court to impose fines in excess of $5 million each against the NDPC and FEF even though in other forums, the government has virtually praised the subpoenaed organizations for their extensive production of documents and admitted

that there were problems with the original service of subpoenas. Moreover, the only evidence tendered to support the government's draconian request is an affidavit which alleges a failure to produce records that, per order of this Court, belong to another party.

In addition, the government's application defies the coercive purposes of the civil contempt statute (18 U.S.C. 1826). The documents in question have been produced or are otherwise in the possession of the government. The grand jury has handed up its indictments and, upon information and belief, has been discharged. All defendants in the criminal proceeding have been arraigned and the trial is presently scheduled for April 6, 1987. There is simply no coercive object in levying fines at this point in the proceedings, especially against parties which complied with the grand jury subpoenas more than eighteen months ago.

NATIONAL DEMOCRATIC POLICY
COMMITTEE AND FUSION ENERGY
FOUNDATION

By Their Attorneys,

/s/ Matthew H. Feinberg
MATTHEW H. FEINBERG, ESQ.
(Local Counsel)
Segal, Moran & Feinberg
210 Commercial Street
Boston, MA 02109
617/720-4444

1/14/87
Date

CERTIFICATE OF SERVICE

I, Matthew H. Feinberg, Esq., hereby certify that I served the within Supplemental Memorandum of the National Democratic Policy Committee and the Fusion Energy Foundation in Opposition to the Government's Motion for Partial Judgment, Supplemental Affidavit of Warren Hamerman, and Supplemental Affidavit of Paul Gallagher by mailing same to Assistant U.S. Attorney Peter E. Gelhaar, 1107 J.W. McCormack Building, Post Office and Courthouse, Boston, Massachusetts 02109.

/s/ Matthew H. Feinberg
MATTHEW H. FEINBERG, ESQ.

1/14/87
Date

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

M.B.D. Nos. 85-203-206

IN RE: GRAND JURY PROCEEDINGS

(CAUCUS DISTRIBUTORS, INC.,
CAMPAIGNER PUBLICATIONS, INC.,
FUSION ENERGY FOUNDATION,
NATIONAL DEMOCRATIC POLICY COMMITTEE)

MOTION FOR RECONSIDERATION, OR IN THE ALTERNATIVE FOR A STAY PENDING APPEAL

Now come the respondents in the above-captioned matter and, by their attorney, hereby move this Court for reconsideration of its Memorandum and Order of Partial Judgement dated February 24 and February 26, 1987 respectively. In the alternative, respondents hereby request that this court stay execution of its Order of Partial Judgement pending appeal. In support of this motion, respondents state that:

1. Subsequent to this Court's denial of the motion for a stay of respondents Caucus Distributors, Inc. ("CDI") and Campaigner Publications, Inc. ("Campaigner"), these respondents filed a notice of appeal to the Court of Appeals. Thereafter the government filed a motion to disregard the notice of appeal and these respondents filed an opposition to United States' motion to disregard contemnors' notice of appeal.

2. While these matters were pending here, respondents proceeded regarding the appeal from the denial of the motion to stay. The matter was docketed and a tentative briefing schedule ordered.

3. During the pendency of this court's determination, pre-trial discovery proceeded on the pending criminal indictments. In that regard, on February 19, 1987, counsel for respondents received the government's responses to defendant's various motions for discovery and the like. In one of the government's pleadings entitled "Government's Response to Defendants' Non-Discovery Motions", the government, through its Assistant United States Attorney, John Markham, states on Page 26, Footnote 8, "The first grand jury (the Moore Grand Jury) was empanelled on May 11, 1984. It commenced the LaRouche credit card fraud inquiry on November 1, 1984 and its term expired in *January, 1986.* A new grand jury was empanelled, commenced hearing evidence in June, 1986 and returned the indictment on October 6, 1986 and this Superseding Indictment on December 16, 1986." (emphasis added). This was the first time that respondents' counsel learned that the grand jury concerning which this court has adjudicated respondents in contempt *ended* its term in *January, 1986.* In addition, this is the first time that respondents' attorneys have been able to infer that a second grand jury, which commenced in June, 1986, did not issue new subpoenas *duces tecum.*

4. The information disclosed in the context of the pre-trial proceedings of the criminal matter clearly demonstrates that the government has mislead this court with regard to the adjudication of contempt and the issuance of its Order of Partial Judgment. This court has never been advised that the term of the initial grand jury which issued the subpoenas *duces tecum* expired in January, 1986.

5. Since the contempt order issued by this court is unequivocably a civil contempt, the fines imposed by this court can only be valid for the life of the grand jury. It is clear that "[c]ivil contempt is a coercive measure used to force individuals to comply with a court's order." *United States v. Petito,* 519 F.Supp. 838, 842 (E.D.N.Y.

1981), *aff'd*, 671 F.2d 68 (2d Cir. 1982). "Once the grand jury ceases to function, the rationale for civil contempt vanishes . . . ." *Shillitani v. United States*, 384 U.S. 364, 371 (1966). "Because of its coercive nature, a civil contempt penalty for refusal to testify before a grand jury cannot extend beyond the term of *that* grand jury." *United States v. Petito, supra* at 842 (emphasis supplied). Thus, if an individual is incarcerated under a court's civil contempt power for refusing to testify before a grand jury, he *must* be released once the term of the grand jury expires, since the possibility of compliance has ended. *Shillitani, supra* at 371; *United States v. Petito, supra*, 671 F.2d at 72; *In re Grand Jury Proceedings (Shocker)*, 541 F.2d 464 (5th Cir. 1976).

6. While a witness may be held in civil contempt for failing to testify or otherwise provide evidence to successive grand juries, such a result cannot obtain by merely continuing the original contempt ruling, as was the case here. Where the government seeks successive incarcerations for civil contempt, the cases are clear as to the procedure to be followed: the witness must be released when the term of the first grand jury expires, a new subpoena to appear before the successor grand jury must be issued and served, the witness must again refuse to testify or otherwise provide evidence to the grand jury, and the court must again find the witness in contempt. *See, e.g., In re Weir*, 520 F.2d 662 (9th Cir. 1975) (defendant held in contempt, grand jury term expired, defendant accepted service of subpoena by new grand jury, appeared before new grand jury and refused to answer same questions asked before prior grand jury, and was again held in contempt); *United States v. Stevens*, 510 F.2d 1101, 1102 (5th Cir. 1975) (similar facts); *In re Andrews*, 469 F.Supp. 171 (E.D. Mich. 1979) (similar facts). There is no reason why the procedure should be any different when the contempt sanction is a fine rather than incarceration; the contempt must terminate as of

the date the first grand jury expires, and any further contempt requires a new subpoena and a new refusal to provide information.

7. The new information that this court now has renders its Order of Partial Judgement a nullity since that judgment runs from an alleged "failure to comply with the grand jury subpoena from April 9, 1985 to and including September 1, 1986." This Court must not only reconsider its order, but should consider sanctions against the government for its blatant failure to advise this Court of the true facts.

8. In any event, this Court's Memorandum and Order dated February 24 and February 26, 1987 is a nullity since this court, after an appeal has been filed and the matter docketed with the Court of Appeal, does not have the power, on its own, to render the order appealed from "manifestly unappealable." The cases that this Court has cited for that proposition are all Court of Appeals cases. It is not for this court to determine whether or not the order appealed from is appealable, but rather a matter for consideration and determination by the Court of Appeals.

9. In any event, all four respondents hereby respectfully request that this court stay the operation of its Memorandum and Order pending appeal to the Court of Appeals. To deny a stay and permit the government to proceed with its enforcement remedies would be manifestly unfair. First, the effect of these civil judgements, if enforced, would be to destroy all four respondents. Second, respondents have demonstrated a substantial appellate issue both with regard to this court's jurisdictional authority and the court's insistence on proceeding to judgement in the face of respondents' claims that to defend itself here would be to irreparably harm their defenses in the pending criminal indictments. Third, permitting enforcement now would create a diversion to

the two criminal defendant respondents and perhaps impair their ability to defend themselves criminally. See *In re Grand Jury Matters*, 751 F.2d 13 (1st Cir. 1984). Finally, no prejudice has been demonstrated to the government should they be prevented from pursuing enforcement remedies at this time. Before these respondents can be effectively put out of business, this court's treatment of them should be reviewed by the First Circuit Court of Appeals.

CAUCUS DISTRIBUTORS, INC. and
CAMPAIGNER PUBLICATIONS, INC.,
FUSION ENERGY FOUNDATION,
NATIONAL DEMOCRATIC POLICY
COMMITTEE,

By their attorneys,

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Dated: March 5, 1987

CONSTITUTIONAL PROVISIONS

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.